

ANTITRUST BUGBEARS: SUBSTITUTE PRODUCTS—OLIGOPOLY *

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Antitrust law and antitrust economics have, over the course of many years, developed a patois or jargon of impressive size. "Rule of reason," "price fixing," "cross licensing," "power to exclude" are among the many terms not infrequently used with respect to antitrust cases or antitrust policy. Generally, they do not enjoy the preciseness of a dictionary definition. For the most part, however, their birth and growth have shaped the course of antitrust enforcement. Their influence on the scope of the antitrust laws has been marked.

In recent years, two terms have increasingly found their way into antitrust literature and antitrust cases. Both have serious implications with respect to the future course of the antitrust laws. The terms are "substitute products"—for which "alternative products" is a synonym—and "oligopoly." The antitrust prosecutor is likely to assert that they were invented by the devil, by which he means defendants' attorneys. Defendants' attorneys would be prone to deny authorship, but would argue that if these terms are shoes that fit a situation, why should they not be used? Attorneys are hardly to be blamed if they and economists, by intellectual prowess and able publicity, have nurtured these terms into sturdy weapons of defense to a monopoly charge. Both are increasingly used to explain why particular situations should not or do not come within the Sherman Act. Both are buttressed by the insistence of numbers of businessmen that examination of the "market" in action, the operations of businessmen in competition with one another, shows that these terms are regularly evaluated factors translated into business judgments. With respect to "substitute products" at least, we may add that the theory, if not the terminology, has been a problem with which the courts have wrestled for many years.

SUBSTITUTE PRODUCTS

When Humpty Dumpty fell off his wall, no one seems to have suggested that a substitute egg might take his place. This may be

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because the event occurred in a less sophisticated age or, perhaps, because there was something about Humpty Dumpty which could not be readily found in other eggs.

Today we live in a world of multiplicity of products. And from the fact of similarity comes substitutability. For example, nylon for silk; aluminum for copper. The no-longer-daily milkman commonly offers the householder a choice of paper containers or milk bottles. Even in the nineteenth century there were significant substitute products. Our ancestors could choose linen or cotton cloth, brick houses or wooden houses, black shoes or brown shoes. But, it is undoubtedly true that when the Sherman Act was passed in 1890, science had hardly begun to add to man's possessions the host of products which have since been made available to him. It seems fair to say that the scale of advertising today assures a consciousness of substitute or alternate products hardly likely to have existed at an earlier period. Significantly enough, however, much of current advertising seeks to persuade the reader, viewer or listener not that he has many alternatives to choose from, but that the thing advertised is unique or superior to alternatives.¹

How does all this affect the antitrust laws? The argument appears to be that substitutes represent a kind of countervailing power, the existence of which may preclude the presence of monopoly power or be a sufficient check upon such power as to obviate action under the Sherman Act. The writer is not aware of any published claim that a doctrine of substitute products would preclude the application of section 1 of the Sherman Act to the price-fixing of, say, white bread or glass bottles. But with respect to monopoly under section 2 of the Sherman Act, the case is otherwise. Antitrust cases involving the question of substitute products are to be found prior to the present decade,² as are occasional references to the subject in economic texts.³

1. See *General Elec. Co. v. Thrifty Sales, Inc.*, CCH TRADE REG. REP. (1956 Trade Cas.) 68482 (Utah Sept. 22, 1956); Smith, *Product Differentiation and Market Segmentation as Alternative Marketing Strategies*, 21 J. MARKETING 3 (1956). In recent years we have seen many conglomerate mergers as well as product diversification without mergers. In such cases, it is not uncommon—especially in the trade press—to find advertising in terms of alternate products, e.g., copper wire or aluminum wire.

2. In *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919), defendants in 1914 introduced testimonial evidence of competing products, and the Government presented rebuttal testimony. This evidence does not appear to have been objected to, possibly because the hearing was held primarily before a special examiner rather than before a judge.

3. See THORELLI, *THE FEDERAL ANTITRUST POLICY; ORIGINATION OF AN AMERICAN TRADITION* 110 (1955); WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 4, 9-10, 12 (TNEC Monograph No. 21, 1940); Wallace, *Monopolistic Competition and Public Policy*, 26 AM. ECON. REV. 77 (Supp. 1936).

It seems fair to say, however, that only in recent times has the matter received a major share of attention.⁴

The Problem as Evolved in the Cellophane Case

In 1947 the United States brought an antitrust suit against E. I. du Pont de Nemours & Company. Du Pont was charged with monopolization of cellophane. Since du Pont controlled about seventy-five per cent of the output of cellophane in this country, it may be surmised that the Government considered the suit as an orthodox example of monopoly. Prior to the trial, however, it became apparent that the defendants would rely heavily upon an attempt to prove inter-product competition. Any conception that all the Government had to do was to make out a case with respect to cellophane was dispelled when, over its objection, the court permitted the defendants to make proof of competition between cellophane and other packaging materials such as glassine, pliofilm, wax paper, aluminum foil, cellulose acetate and polyethelene film.⁵

The trial court, in holding for the defendants, gave great weight to this competition of substitute products. Judge Leahy acknowledged that economists differed as to the significance to be attached "to the presence in the market of products which are substitutes or alternatives for the product said to be monopolized." He found, however, that "the relevant market for determining the extent of du Pont's market control is the market for flexible packaging materials. . . . Cellophane is forced to meet competition of other flexible packaging materials. The competition between the materials is intense and du Pont cannot exercise market control or monopoly powers."⁶

Elsewhere in its opinion and findings, the court discusses the problem of substitute products in the context of control over price.⁷ On appeal to the Supreme Court, the Government in its brief propounded the major issue in terms of whether the lower court had erred in using the existence of competing substitute products as a test to determine whether du Pont had monopoly power. On the other hand,

4. For a review of the development of economic thought on the problem, see Stocking & Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29, 44-48 (1955).

5. One of these materials was parchment paper which previously had been held subject to the provisions of § 2 of the Sherman Act. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

6. *United States v. E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 60, 88 (D. Del. 1953).

7. *Id.* at 206-09.

the defendant's counsel, in brief and in argument, presented the primary issue in terms of whether it was proper for the trial court to have considered substitute products as a test to determine whether du Pont had monopoly power over price.⁸

There can be major differences in the use of the doctrine of substitute products to test monopoly power and its use to test monopoly power over prices. The first could readily emasculate section 2 of the Sherman Act. The second would impede its application—how gravely would be left to a series of decisions to determine. For the most part, commentators have not made the distinction adduced in the *du Pont* case by the defendants. They have generally been concerned with the degree of substitutability and the rightness or wrongness of considering substitutability to determine the existence of monopoly power. This may be, however, because quite often their discussion of monopoly power is in the context of an analysis of power over price.

Certain positions taken or alleged to have been taken by the government in its brief and on argument before the Supreme Court have been sharply criticized in a recent article.⁹ Whatever may be said on that score,¹⁰ the thesis of the instant article is opposed to the authors' apparent position that it was necessary for the Government to prove a broad flexible wrapping materials market, a cellophane market not appreciably narrower, and "abandon reliance on proof of mere existence of monopoly power in cellophane."¹¹

The argument in the Supreme Court was well attended, perhaps in realization of the importance of the issues.¹² That the Court had considerable trouble with the problem presented by the case appears from the fact that although it was argued during the first week of the fall term, in October 1955, it was not decided until June 11, 1956, the last day on which opinions were rendered. By a vote of four to three

8. With respect to the power to exclude, defendants took the position that valid patent rights gave them such power with respect to moisture-proof cellophane.

9. Dirlam & Stelzer, *The Cellophane Labyrinth*, 1 ANTITRUST BULL. 633 (1956).

10. The approach of this article varies considerably from the position taken by both parties before the Supreme Court.

11. Dirlam & Stelzer, *supra* note 9, at 640.

12. Of this case it has been said that, "The whole process of antitrust enforcement has undergone a great change since the cellophane case was decided against the government. . . . Unless the decision is reversed by the Supreme Court, the case appears to have shifted antitrust-enforcement philosophy back to the 'rule of reason' of the 1920's. . . . How good this is for the economy and how much it will lessen competition, only the future will tell." Harris, *The Urge To Merge*, *Fortune*, Nov. 1954, pp. 102, 240-42. It has been termed "a quiet revolution." QUINN, *GIANT CORPORATIONS: CHALLENGE TO FREEDOM* 118 (1956). See also *Business Week*, Sept. 22, 1956, p. 88.

the Supreme Court affirmed¹³ the lower court's decision in an opinion which was even more far reaching than that of the lower court.

Said the Court: "If cellophane is the 'market' that du Pont is found to dominate, it may be assumed it does have monopoly power over that 'market'. . . . Moreover, it may be practically impossible for anyone to commence manufacturing cellophane without full access to du Pont's technique." But since, "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade," and upon that appraisal cellophane is "part of this flexible packaging material market," it is immaterial whether "du Pont could . . . exclude competitors . . . from the manufacture of cellophane."¹⁴

The effect of this decision is to exempt from the monopoly laws an identifiable annual business of over \$100,000,000. By a process of legal-economic chemistry, cellophane disappears as an object of trade and commerce subject to monopolization under the Sherman Act, albeit we can still obtain cellophane as an object by asking for it, can observe it upon removal of our legal spectacles, can feel it, can pay taxes upon it, can sue for breach of contract or tort with respect to it, and, in a non-illegal way, even engross it.

The *du Pont* case acknowledges no debt to a publication which had appeared one year before the trial court's opinion. But in 1952, the Business Advisory Council made a report to the Secretary of Commerce, who gave it a warm endorsement. The report was entitled, *Effective Competition*. It was not welcomed in antitrust prosecution circles. The report recommended the use of "effective" or "workable" competition as a test for the application of the antitrust laws. A cornerstone of that tenet was "substitute products."¹⁵

13. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Justice Reed rendered the opinion for the majority. With him were Justices Burton, Frankfurter and Minton. The dissent consisted of Justices Black, Douglas and Warren. Justices Clark and Harlan did not participate in the decision. Justice Frankfurter wrote a concurring opinion in which he disassociated himself from certain dicta in Justice Reed's opinion.

14. *Id.* at 391-92, 394, 400, 403.

15. "The main task in interpretation and administration of the antitrust laws in the public interest should be to decide whether or not effective alternatives exist in any given market, or at least whether freedom exists to create such alternatives. In deciding, administrators should be required to give consideration to alternatives available from any sources, whether or not the source happens to be within the conventional boundaries of this or that industry." BUSINESS ADVISORY COUNCIL, *EFFECTIVE COMPETITION* 9 (1952). For a statement that the goal of antitrust law is more workable competition rather than workable competition, but a market analysis that seems inconsistent with the statement, see Comment, 65 YALE L.J. 34, 55-57, 83 (1955); cf. ANSHEN & WORMUTH, *PRIVATE ENTERPRISE AND PUBLIC POLICY* 88 (1954): "Monopolistic competition is not incompatible with 'effective competition' or 'workable competition'. Substitutability in the field of differentiated products serves as a check upon the producer or seller." See also PEGRUM, *THE REGULATION OF INDUSTRY* 89 (1949); STOCKING & WATKINS, *MONOPOLY AND FREE ENTERPRISE* 13 n.8 (1951). With respect to this view it has been said, "The public policy implications of this line of reasoning are fairly obvious. It leads readily to acquiescence in the status quo and to a low estimate of the value of remedial action designed to increase the number of sellers and reduce the monopoly elements in industrial markets." *Id.* at 99. See also note 70 *infra*.

*Does Section 2 of the Sherman Act Require Finding a
"Market" Having Substitute Product Boundaries?*

Neither section 1¹⁶ nor section 2 of the Sherman Act¹⁷ make reference to a "market" concept. The proponents of the substitute products rule do so, however, by importing into the Sherman Act a requirement that a market be found.

Perhaps the leading exponent of this view is the report of the Attorney General's National Committee To Study the Antitrust Laws, published in March 1955.¹⁸ The *Report* starts with the statement that, "The general objective of the antitrust laws is the promotion of competition in open markets." Some pages later, in discussing section 1 of the Sherman Act, the *Report* states that cases arising under that section may pose at least four main issues, one of which is "in what market is the effect of the challenged arrangement to be tested, and what evidence is relevant in establishing that market as a fact to be found by the court?"¹⁹

Not until page 44 of the *Report*, in a footnote, are we told that definition of a market is not necessary in all cases under section 1 of the Sherman Act. Such concession is not made with respect to a monopolization charge under section 2 of the Sherman Act. To the question, "Monopolize what?," the *Report* answers, "A market." And both the majority and dissenting opinions of the Supreme Court in the *Cellophane* case adopt this approach.

But, section 2 itself furnishes the object of the verb "monopolize" by the phrase, "Any part of the trade or commerce."²⁰ The use of a substitute product test to import into the Sherman Act a market requirement would change the language of the act. It might result in confining the application of the quoted clause largely to problems as to the geographic application of the federal antitrust laws.

Prior Decisions

In 1911, the Supreme Court in the *Standard Oil* case²¹ pointed

16. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

17. 26 STAT. 209 (1890), 15 U.S.C. § 2 (1952): "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ."

18. Hereinafter cited as *REPORT*.

19. *REPORT* at 12. The *REPORT* adds: "Finally, in what relevant market, does the conduct challenged 'unduly' restrain competition?" Referred to with approval in Comment, *The New Federal Trade Commission and the Enforcement of the Antitrust Laws*, 65 YALE L.J. 34, 47 (1955), where it is said: "The antitrust laws deal with market problems; they must be construed in terms of market standards or market analysis."

20. Emphasis added.

21. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

out that the early English statutes which forbade engrossing did not require that the quantity engrossed be the whole "or a proximate part of the whole of an article."²² Turning to the Sherman Act, the Court said:

"The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."²³

This interpretation was subsequently broadened to include "any part of the classes of things forming a part of interstate commerce."²⁴ It has been pointed out that the Sherman Act applies to monopolies of limited duration.²⁵ And there is a long line of cases²⁶ in which the

22. *Id.* at 53.

23. *Id.* at 61.

24. *Farmer's Guide Co. v. Prairie Co.*, 293 U.S. 268, 279 (1934), approved and applied in *United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947). But in several recent antitrust cases—*Lorain Journal Co. v. United States*, 342 U.S. 143, 151 n.6 (1951); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948); *United States v. Yellow Cab Co.*, *supra* at 225—the Supreme Court has spoken of an "appreciable" part of commerce. "Appreciable" is not found in the statute. Whether the Court had in mind something more than *de minimus* is not clear. If it did, it is a qualification which should be rejected. Congress hardly intended one rule for those affected by a "small" monopoly and another rule for those affected by a "large" monopoly.

25. *Peto v. Howell*, 101 F.2d 353, 356 (7th Cir. 1938) (corner of July corn on Chicago market).

26. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (newspaper advertising as distinguished from other mass advertising media); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172-73 (1948) (motion pictures licensed for first-run exhibition as distinguished from subsequent runs); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) (taxicabs from one source for four cities as against taxicabs generally from other sources); *Farmer's Guide Co. v. Prairie Co.*, 293 U.S. 268 (1934) (advertising in certain farm journals in certain regions as against advertising in farm journals generally); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 422-23 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952) (one type of pump as distinguished from other types of pumps); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) (particular business location as against other business locations); *United States v. National City Lines, Inc.*, 186 F.2d 562, 566-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (one customer's purchases of petroleum products, busses and tires as against the total market for such products); *United States v. Aluminum Co.*, 148 F.2d 416, 425-26 (2d Cir. 1945) (primary aluminum as against scrap aluminum and competing metals like copper); *Fashion Originators' Guild, Inc. v. FTC*, 114 F.2d 80, 85 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941) (designs of certain dresses as against designs of and other dresses); *Peto v. Howell*, 101 F.2d 353 (7th Cir. 1938) (July corn on Chicago market as distinguished from other corn); *Bausch Mach. Tool Co. v. Aluminum Co.*, 72 F.2d 236, 241 (2d Cir.), *cert. denied*, 293 U.S. 589 (1934) (primary aluminum as against aluminum from scrap and foreign sources); *Lee Line Steamers, Inc. v. Memphis, H. & R. Packet Co.*, 277 Fed. 5 (6th Cir. 1922) (steam boat lines as against railroad lines); *United States v. Kansas City Star Co.*, 1955 Trade Cas. ¶ 68040 (W.D. Mo.); *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 908 (D. Mass. 1954) (raw cranberries or processed cranberries); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945) (linen rugs as against other floor coverings); *United States v. Corn Products Refining Co.*, 234 Fed. 964, 974-77 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919) (starch and syrup made from corn as distinguished from starch and syrup made from other raw materials); *O'Halloran v. American Sea Green Slate Co.*, 207 Fed. 187 (N.D.N.Y. 1913), *rev'd on other grounds*, 229 Fed. 77 (2d Cir. 1915) (sea green slate as against slates of other colors and other roofing materials); see *American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946); cf. *Sugar Institute, Inc. v. United States*,

courts have applied section 2 of the Sherman Act to a part of trade and commerce with an express or implicit rejection of the premise that the existence of substitute or alternative products precluded a holding of monopoly.²⁷ A similar approach has been taken in cases arising under section 3²⁸ of the Clayton Act,²⁹ as well as under the Federal Trade Commission Act.³⁰

This approach has also been taken where the "part" was a geographical part which was a well-recognized political unit,³¹ as well as where the part lacked such identity.³² This has also been true with respect to combinations in restraint of trade.³³ One of the most famous

297 U.S. 553, 600 (1936) (domestically refined cane sugar as against off-shore and beet sugar); *United States v. New England Fish Exchange*, 258 Fed. 732 (D. Mass. 1919) (ground fish as against other fish); *United States v. King*, 229 Fed. 275 (D. Mass. 1915) (Aroostook County potatoes). See also Keyes, *The Shoe Machinery Case and the Problem of the Good Trust*, 68 Q.J. Econ. 287, 294-97 (1954).

27. In distinguishing some of these cases, the Supreme Court in the *Cellophane* case refers to four cases—*Fashion Originators' Guild*, *Paramount Pictures*, *Associated Press* and *Times-Picayune*—as being concerned only with the question of whether there had been an attempt to monopolize. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395-96 n.23 (1956). But the Supreme Court's opinion in the *Paramount* case, at the very outset, pointed out that the defendants were charged with monopolization. It also said that, "The controversy over monopoly relates to monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 167 (1948). The lower court, in its findings and conclusions of law, had expressly found there was no monopoly. The Supreme Court directed the lower court to reconsider findings as to monopoly. *Id.* at 173. On remand the trial court entered a considerable number of findings of fact as to the existence of monopoly status and power. *E.g.*, F. 147(d): "There is substantial proof that monopoly power existed among the eight of distributor-defendants who were all working together. . . ." Four of the conclusions of law expressly dealt with "monopoly." Thus, according to conclusion 13, "The collective monopoly power of the defendants named in Paragraph 7 above (taken together with Paramount and RKO) to exclude competitors from first run coupled with their intent to exercise this power violated Section 2 of the Sherman Act." It is submitted that the *Paramount* case was not correctly cited on this point. Furthermore, a distinction between attempts to monopolize and the achievement of monopoly in this context seems quite dubious. Would the Court allow the Government to prove du Pont attempted to monopolize cellophane or would it have required the Government to prove an attempt to monopolize flexible packaging materials? And, if the former, what kind of relief could the Government get where in fact there was a monopoly but the Court permitted a finding only of attempt to monopolize? Query whether in the *Paramount* case the Government would have been able to obtain divorcement and divestiture if only an attempt to monopolize had been found.

28. Section 3 prohibits tie-in contracts which may have the effect of substantially lessening competition or "tend to create a monopoly in any line of commerce." 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).

29. *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Oxford Varnish Corp. v. Alt and Wiborg Corp.*, 83 F.2d 764, 766 (6th Cir. 1936).

30. *Fashion Originators' Guild, Inc. v. FTC*, 114 F.2d 80, 85 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941); *Eastman Kodak Co. v. FTC*, 158 F.2d 592, 594 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947).

31. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942).

32. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738, 744 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948).

33. *Associated Press v. United States*, 326 U.S. 1, 17-18 (1945) (the complaint also charged attempt to monopolize); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 307-08 (N.D. Ohio 1949), *modified on other grounds*, 341 U.S. 593 (1951).

judges of the century—Judge Learned Hand—has been, perhaps, the foremost apologist for this approach.³⁴

On the other hand, it is rare to find a court rejecting evidence of this kind.³⁵ Most of the reported cases seem to accept the admissibility of such evidence³⁶ without express ruling on the question. And there is a line of cases difficult to reconcile with those we have cited.

In *Standard Oil Co. v. United States*,³⁷ three oil companies owning patents on processes for cracking gasoline effected a cross licensing contract under which the primary defendants could maintain existing royalties. The Government had charged violation of both section 1 and section 2 of the Sherman Act with respect to gasoline produced by the cracking process. The court found there was no monopoly or illegal restraint with respect to cracked gasoline. It then found that the latter was about twenty-six per cent of the total gasoline produced, the rest of which was indistinguishable from cracked gasoline and either mixed or sold interchangeably. It stated that the defendants therefore had no effective control over the supply and the price.³⁸ The case has been somewhat limited, but not repudiated, on this score.³⁹ Other cases have taken a similar approach,⁴⁰ and the much-criticized *Times-Picayune* case⁴¹ could be—and was—cited by both sides in the *du Pont* case when the latter reached the Supreme Court.

The substitute product theory would seem to accept a finding of monopoly in a town of 1,000 of a product for which substitutes were

34. *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945); *Fashion Originators' Guild, Inc. v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941); *United States v. Associated Press*, 52 F. Supp. 362, 371-72 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919).

35. *But see United States v. National City Lines, Inc.*, 186 F.2d 562, 572-73 (7th Cir.), *cert. denied*, 341 U.S. 916 (1953).

36. It may be noted that in merger cases under § 7 of the Clayton Act, 38 STAT. 731 (1914), as amended, 15 U.S.C. § 18 (1952), defendants often try to prove separability of markets or distinctiveness of product in order to show absence of competition, while the plaintiff argues the contrary. *E.g.*, *International Shoe Co. v. FTC*, 280 U.S. 291 (1930); *American Crystal Sugar Co. v. Cuban-Am. Sugar Co.*, CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68473 (S.D.N.Y. Aug. 30, 1956); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

37. 283 U.S. 163 (1931).

38. On the basis of the assignments of error and the briefs filed in the case, it is difficult to see how this issue came before the Court.

39. *See Farmer's Guide Co. v. Prairie Co.*, 293 U.S. 268, 279 (1934).

40. *Cole v. Hughes Tool Co.*, 215 F.2d 924, 938-40 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955) (types of well-drilling bits); *Fargo Glass & Paint Co. v. Globe Am. Corp.*, 201 F.2d 534 (7th Cir.), *cert. denied*, 345 U.S. 942 (1953) ("Dutch Oven" gas ranges); *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 721, 729-30 (6th Cir. 1909) (Lake Copper or Best Lake Copper as against other copper); *cf. United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *United States v. Crown Zellerbach Corp.*, 141 F. Supp. 118, 130 (N.D. Ill. 1956). *See also Business Week*, Sept. 22, 1956, p. 88.

41. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

not available, even though outside the town no such monopoly existed, but would not recognize as a monopoly complete control in a nation of 200,000,000 people of that product if there were other substitute products!

How far this search for a market and the use of substitutes as a test therefor may lead may be seen from the fact that some economists have asserted that the *Aluminum* case⁴² was wrongly decided because the court refused to consider the "market" as including secondary aluminum (scrap) and other competing metals.⁴³ And this assertion has been made despite the fact that the antitrust suit was a primary factor in converting a one-company industry into one where four major companies compete; where one of the new companies has been the primary innovator and which has become increasingly competitive with other metals because of the increased competition within the aluminum industry.

It may be noted, moreover, that in recent years the price spread between aluminum and its main competitive metal, copper, has widened considerably from what it was at the time of the trial of the *Aluminum* case.

Substitute Products and Demand

Markets are created by demand, and this is true whether the demand is for a specific thing or a class of things. Consumer preference will generally give identity to the thing preferred. The fact that there are substitutes or alternatives cannot ignore the reality that after an initial period in which to gauge demand, it will generally be true that continued production is for the purpose of meeting demand. If that situation exists, the product and its producers have a market. Nor is there any chemical or physical law that each product must have one market or industry.⁴⁴ There are domestic markets, foreign markets, retail markets, wholesale markets, to name a few in which we may find the same product bargained for. Who is there to say that there could not be a monopoly of the one because of the existence of the others? So, also, there is no technical common-law doctrine of merger which causes a smaller market for a product to disappear because of the existence of a larger market at the same level of distribution.

42. *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945).

43. See Merriam, *The Sherman Antitrust Act and Business Economics*, N.Y. STATE B.A. ANTITRUST LAW SYMPOSIUM 98 (1950). A few years ago, this writer was present at a conference of prominent economists where one economist stated that it was ridiculous for the United States to have charged Alcoa with a monopoly in aluminum since there was widespread competition between aluminum and copper.

44. Cf. Fouraker, *A Note on the Definition of a Commodity*, 23 So. ECON. J. 80 (1956).

At least up to the point where there is a mingling of things within a class, the concept of monopolization of any part of the class would seem well within the understanding of layman, lawyer or economist. The greater the degree of identity (uniqueness) of the member, the more readily may this be perceived even after mingling. Of course, even if indistinguishable after mingling, monopolization may arise when viewed in the light of how much of the whole is the part wholly monopolized.

At any rate, if I want to buy cellophane in a free market it is no answer to tell me that I can buy glassine in a free market or in a partially free market. And it may be doubted that a suit for failure to deliver cellophane could be defeated by the promisor's willingness to deliver glassine. Nor can fungibility be considered the test as to the existence of monopoly power where there are substitutes, since it ignores the factors of time and availability.⁴⁵ A shortage, for instance, may create a demand for a segregated quantity of a fungible commodity, control of which may well appeal to the monopolist.

It is submitted that if a thing may be restrained within the meaning of section 1 of the Sherman Act, it may be monopolized within the meaning of section 2 of the Act. If all the makers of cellophane agree to, and do, fix the price of cellophane at one cent higher than certain other packaging materials, this is both an agreement in restraint of trade and an exercise of monopoly power, whether or not there were substitute materials.⁴⁶ If the parties to the agreement find they cannot maintain the agreement, it is hardly likely to be of long duration and both the restraint and the monopoly power will disappear. If there were an agreement among all cellophane makers to restrict the output of cellophane, here again there would be both an agreement in restraint of trade and an expression of an intent to exercise collective monopoly power.

Let us suppose there are five cellophane makers doing a profitable business, and one acquires the other four. Does the fact that there

45. See CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 62-64 (6th ed. 1948). In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613 (1953), the Court considered that advertisers viewed the city's newspaper readers, morning or evening, "as fungible customer potential," and therefore the advertisers obtained the same "product," namely, access to newspaper readers, whether they advertised in a morning paper or in an afternoon paper. The Court seems to have assumed that all persons buy two newspapers a day and that there is no advantage to any reader in reading an ad in the morning or in the afternoon. One wonders whether the judges realized that it is not uncommon where there is a morning and an afternoon paper for the same advertiser to take quite different ads. The advertisers, moreover, with a limited budget, might well prefer the afternoon rather than the morning readers, and by so doing recognize that the latter have an identity of their own. The Government, in its brief in the *du Pont* case, suggested the absence of fungibility as a possible distinction between that case and others.

46. Cf. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

are glassine, wax paper and other packaging materials take such acquisition out of either section 2 of the Sherman Act or section 7 of the Clayton Act? In each instance, the possible or actual harm to the public is obvious, and is the type of harm the Sherman Act was designed to prevent.

To take a more difficult case, let us suppose that a number of consumers desire to buy red, white and blue streamers together, but not merely red ones. Can red streamers be monopolized? The answer is, "Why not?" Suppose I bought up all the supply of red streamers in order to engross the supply. Suppose there were only four companies which made red streamers because they were not as popular as other streamers. If someone acquired all four companies, here again an engrossment or monopolization might occur. It is no answer to say that in some near time in the future others would make red streamers and the monopolization would be of short duration. He who engrossed the supply of wheat going to the market on one day could hardly exculpate himself by saying that tomorrow there would be no engrossment.⁴⁷

The presence of substitute or alternative products may well be a curb on monopoly power. But so, for that matter, are taxes, floods and the antitrust laws. A patent holder may have to contend with competing patented processes or machines, but few would deny that he has a monopoly within the scope of his patent.⁴⁸ The scope of monopoly power may range from very weak to very strong. But as long as the power exists and is intended to be used or has been achieved through means which do not recommend themselves to the courts, it is difficult to see how it can avoid offending the public interest protected by the Sherman Act. The force and effect of monopoly power within a small, but not unimportant economic orbit, cannot be ignored because in the larger orbit it has less effect. Persons within that lesser orbit should not be read out of the Sherman Act by a doctrine of substitute products.

47. *Cf. Steers v. United States*, 192 Fed. 1 (6th Cir. 1911) (combination in restraint of trade of a producer's tobacco). In the red streamer case posited in the text, if the acquisition occurred before Christmas and the price went up, an action of damages by one having standing to sue would not be defeated because at the time of the suit the price had fallen by reason of the fact that more producers had come into the market. According to one economist, some economists have failed to distinguish between competition between goods and between sellers and this has led them to claim monopoly cannot exist because of the first kind of competition. *MACHLUP, THE ECONOMICS OF SELLERS' COMPETITION* 82 (1952).

48. If the patentee sells his rights to someone for \$100,000 because of the belief of the buyer that the process or machine will be widely accepted in preference to alternatives, and this turns out to be otherwise, it remains a fact that it was monopoly power that brought the patent holder the amount he received.

All men are animals, therefore all animals are men, is a classic example of illogic. It would seem equally fallacious to say that because all cellophane is in the flexible packaging field, all flexible packaging materials are in the cellophane field.

*Is the Doctrine of Substitute Products Compatible With the
Concept of Monopolization of an Industry?*

The central discussion of monopoly in the Attorney General's Committee Report⁴⁹—written largely by lawyers, we may presume—equates monopoly power with monopoly power over a market.⁵⁰ In a chapter entitled "Economic Indicia of Competition and Monopoly," for which the economists on the staff probably were primarily responsible, we do find it said in a discussion of the effect of substitutes on definition of the market: "It emphatically does not mean that public policy can afford to be indifferent to the elimination of competition within the industry. In the interest of rivalry that extends to all buyers and all uses, competition among rivals within the industry is always important."⁵¹ But even this thought becomes buried in a lengthy economic discussion in which the market is the central theme.⁵²

The Report's approach would seem to confine the antitrust laws to a world of buyers and sellers, an economic world in which the public is interested only as consumers, a public whose only or primary interest as such is in the price of a commodity.

Commercial activity is not merely a matter of buying or selling a commodity. It never has been. A monopolization of an industry, certainly at common law, and in the minds of the authors of the Sherman Act, was something to be prevented by application of the antitrust laws; the right to invest in, to work in, and to make a living by manufacturing or practicing a trade is as much to be protected by the Sherman Act as is the right of the seller of the finished product to sell his wares in an unmonopolized market.⁵³ But to some econo-

49. See REPORT at 44-48.

50. See Carlston, *Basic Antitrust Concepts*, 53 MICH. L. REV. 1033, 1046-52 (1955).

51. REPORT at 322.

52. For a similar approach, see Keyes, *supra* note 26, at 300-20. Keyes states that the market to be concerned with is "that confronting the individual firm." The trouble with such statement is that it does not specify who is to make that determination and whether or not there cannot be more than one such market. The businessman might say that his "market" is cellophane for some purposes and packaging materials for others, or he might make an exclusionary choice, but judges, lawyers and economists might well differ as to what market that firm is confronted with. In at least one case involving complementary products, the court did find the market in terms of what the largest producer manufactured. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

53. See THORELLI, *op. cit. supra* note 3, at 17-18, 22-25; Marcus, *Civil Rights and the Antitrust Laws*, 18 U. CHI. L. REV. 171, 185 (1951).

mists, at least, attention to the buy-and-sell relationship tends to exclude, automatically, other economic elements from their concept of monopoly problems.⁵⁴

It is no answer to the entrepreneur who, because of his experience, available capital or for some other reason, desires to manufacture cellophane or produce aluminum rather than wax paper or copper, to tell him that although that door is closed, he is free to make "substitute products." Nor is that a satisfactory answer to the worker whose skills or interests lie in one field and not in another.⁵⁵ An employee is engaged in trade and commerce. And it would seem not amiss that the Sherman Act be concerned to protect him from undue concentration as well as buyers and sellers of the product. Typically, monopolists in a period of recession or depression will think first of cutting production and employment, rather than prices.⁵⁶ Monopolistic competition, which is what the doctrine of substitute products leads to, is not compatible with freedom of entry.⁵⁷ "Effective monopoly" may, in the short run, at times, benefit consumers. But competition and new entrants are also part of the business cycle within the protection of the Sherman Act.

Industries and markets are not always distinguished. And in some instances specification of the members of an industry may be more difficult than designation of the sellers in a market. But the concept of an industry is an important one.⁵⁸ Government agencies commonly compile business statistics in terms of industries. And concentration studies usually focus upon the status of particular industries.⁵⁹ Much more often than not, the term has a usable meaning

54. Thus, one writer attempts to define an industry in terms of the substitution flexibility of a "consumer." Fouraker, *supra* note 44. Another economist dogmatically asserts that, "Questions relating to competition, monopoly and oligopoly must be considered in terms of markets, while questions concerning labour, profits, technical progress, localization and so forth have to be considered in terms of industries." Robinson, *The Industry and the Market*, 66 *ECON. J.* 360, 361 (1956). Robinson gives no rationale for this statement. It is submitted that questions concerning "labour, profits, technical progress and localization" may be and have been considered as part of questions of competition, monopoly and oligopoly.

55. Cf. Clark, *Competition and the Objectives of Government Policy*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 332-34 (Chamberlin ed. 1954).

56. See Ellis, *Monopoly and Unemployment*, in *PRICES, WAGES AND EMPLOYMENT* (Post War Economic Studies No. 4, 1946).

57. "Under monopolistic competition, then, there can be freedom of entry only in the sense of a freedom to produce substitutes . . ." CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 201 (6th ed. 1948).

58. Cf. MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION* 214-16 (1952); Chamberlin, *Measuring the Degree of Monopoly and Competition*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 258 (Chamberlin ed. 1954); Robinson, *supra* note 54.

59. LEONTIEF, *STUDIES IN THE STRUCTURE OF AMERICAN ECONOMY* (1953); NATIONAL BUREAU OF ECONOMIC RESEARCH, *BUSINESS CONCENTRATION AND PRICE POLICY* (1955). But cf. MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 486 (1952): "The most serious defect of a concentration index as an index of degree of monopoly is its failure to reflect competition from 'other industries.'"

in the business world. The Small Business Act of 1953 defines a small business concern as one "which is independently owned and operated and which is not dominant in its field of operation."⁶⁰ The Small Business Administration in administering this act has made considerable use of industry classifications.⁶¹

In the manufacturing field, an industry may be defined in terms of the products made or the processes of manufacture used.⁶² "Physical or technological structure and homogeneity of production are more important considerations in the classification system than close substitutability of demand for products."⁶³ This is a recognition that things may be close substitutes for purposes of sale but not close substitutes for purposes of production.⁶⁴ And one's position in an industry is generally measured in terms of value of output, employment and fixed assets.⁶⁵ These norms do not lose realism when the question of monopoly arises.

Both the majority and minority opinions in the *Cellophane* case make hurried references to a cellophane industry. The minority even discusses competition within the cellophane industry, but avoids posing an issue under section 2 of the Sherman Act of monopolization of an industry by quickly retreating into a discussion of the "relevant market."

Concentration in an industry cannot be ignored in an antitrust analysis because of a search, perhaps unrewarding, for concentration in a market. Industry concentration studies have been made with respect to knit goods, wallpaper and many other commodities for which there are obvious substitutes, in terms of percentage of employment accounted for by the leading three or four firms.⁶⁶

There are many economic steps capable of being monopolized before a finished product gets to the consumer. Let us take beet sugar and cane sugar which have interchangeable end uses: Does the existence of a larger amount of cane sugar than beet sugar mean that the production, the manufacture or sale of beet sugar cannot be monopolized?⁶⁷

60. 67 STAT. 233 (1953), 15 U.S.C. § 632 (Supp. III, 1955).

61. See Business Service Bull. No. 83, Dec. 1954.

62. NATIONAL BUREAU OF ECONOMIC RESEARCH, *op. cit. supra* note 59, at 18.

63. *Id.* at 21.

64. "Production means the creation of goods or services which have time, form, or place utility. Thus every commodity which has a different form is, strictly speaking, a different commodity, and even if the same good is available in different places or at different times, it is also a different commodity." PEGRUM, *op. cit. supra* note 15, at 89-90.

65. NATIONAL BUREAU OF ECONOMIC RESEARCH, *op. cit. supra* note 59, at 89.

66. See *id.* at 74-75 (table 5).

67. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

If, in the packaging field, there were only one company in each segment of that field, *i.e.*, cellophane, pliofilm, etc., it would seem anomalous that this situation could not be reached by the antitrust law no matter how that solitary state had been arrived at or was being used in the segment because the product of any one was a substitute for the product of the other.⁶⁸

Power Over Price

The monopolist's range of power over price may be limited by existence of substitute products in the market. This is not a relevant consideration, however, as to whether there is a violation of the Sherman Act if he has any power, not *de minimis*, over the price of his product arising from his controlling position as producer or seller or buyer with respect to that type of product.

That the price of a differentiated product is the same as the price of substitute products is not a negation of monopoly power over the differentiated product.⁶⁹ If there were active competition as to that product, it might be that the price would reflect such competition and as a result (1) be lower than it would otherwise, (2) be lower than that of substitute products or (3) even force the price of the latter to be lowered to meet the competitive price of the differentiated product.⁷⁰

The monopolist of a product almost inevitably has an advantage over substitute product competition as to which such monopolistic

68. *Cf.* QUINN, *GIANT CORPORATIONS: CHALLENGE TO FREEDOM* 121 (1956). "Competition is always possible from another industry and the song of the industry monopolist today is that he is kept on his toes by that potential threat. That amounts to an admission that there is no effective competition remaining in his own industry."

69. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 64, 67 (6th ed. 1948).

70. "Mr. Lilienthal is also inconsistent on the relation between the numbers of competitors and the intensity of competition. He seems to think there is little if any real relation. Yet he insists on the importance of inter-commodity competition, and of the 'one big market' of the Continental United States. But their importance lies in the fact that they introduce more competitors into any given market. The crucial question is particular, not general: how much competition is introduced into the specific market at the specific time? Some of Mr. Lilienthal's own examples seem to me to argue convincingly on the side of another and different kind of public policy from the one he urges. Thus, he hints broadly that TVA was faced with high non-competitive prices for copper transmission lines; but the monopoly situation was circumvented by turning to aluminum cable at a considerable saving. It may be asked: What of buyers who were businessmen, who had to worry about making a profit, and were subject to the pressure of time and the cost of interrupted production? If there had existed not one monopolist of aluminum but a few (big) competitors, might not aluminum cable have been more widely and cheaply available? And if, in addition, the antitrust laws had been more vigilantly enforced, would not the rigging of copper prices have been impossible even *without* any special Government intervention?" Adelman, *Symposium Review: Galbraith's "Concept of Countervailing Power" and Lilienthal's "Big Business,"* 49 NW. U.L. REV. 161 (1954).

situation does not exist.⁷¹ The advantage need not be great if it has economic significance.⁷² Moreover, the presence of such monopoly power is itself an incentive for the evolution of a similar situation with respect to substitute products.

A Place for Substitute Products

Should an issue of substitute products have any place in an antitrust suit? Under some exceptional circumstances, the answer may be in the affirmative. In a private antitrust suit on the question of damages, it should be possible in some types of cases for a defendant to show that the competition of substitute products had a definite bearing upon the plaintiff's losses. But in such a case, a heavy burden should rest upon the defendants to show that the plaintiff's damages were caused by such competition rather than by plaintiff's wrongdoing.

On the question of relief in a suit seeking to change the structure and practices of the major companies in an industry, it will generally be improper to use the composition and practices of a competing industry as a guide. Yet there may be instances where it may be proper to consider the effect of a proposed decree upon the ability of the industry to compete with that of a substitute product. Since any effective decree in a monopoly case is likely to evoke from defendants the cry of "chaos," which subsequent experience shows to be unwarranted, the proponent of such argument should have a heavy burden of persuasion before evidence as to a competing industry is permitted.

The Public Interest

It is submitted that the doctrine of substitute products is not, either by itself or as a refinement of the concept of countervailing power, a satisfactory criterion for the application of the Sherman Act.

71. Cf. ELLIOTT, INTERNATIONAL CONTROL IN THE NON FERROUS METALS 383 (1937): "Intercommodity competition is always present in the fields of marginal use. . . . The universal presence of this factor makes it impossible to consider the price policy of any commodity in the abstract; it can only be considered in its relation to all possible competitors. This factor also brings out differences in the organization and policy of the respective industries; obviously a monopolistic organization is in a better position to carry on this constant intercommodity struggle than is an industry of independent and competing units, particularly if the monopoly pursues a discriminatory and aggressive price policy in the fields of marginal use and recoups the losses from its definitely established field."

72. In *United States v. Kansas City Star Co.*, 1955 Trade Cas. ¶ 68040 (W.D. Mo.), the court charged the jury: "Monopolization need not extend to all substitute or alternate advertising media. We should look rather to the question of whether or not the alleged monopolist enjoys an advantage over his competitors which confers upon him a monopolistic or controlling influence or domination. Monopolization may be measured by the handicap or control it imposes. That advantage alone may create a monopoly or make a monopoly unlawful." This charge probably owes much to the remarks of Judge Learned Hand in *United States v. Associated Press*, 52 F. Supp. 362, 371 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). See also CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 67 (6th ed. 1948).

The generality of the Sherman Act has been recognized as one of its most important characteristics. That generality should not be excised by definitional limitations. It is one thing to use the term "market" as a word of description in an antitrust situation where that term aids understanding. It is quite another to use it as a definition to limit the application of the act.

The public should not be confined to any single definition or standard in receiving the benefits of the antitrust laws. We live under a social system which is deeply concerned with the minority and the individual as well as with majority groups. And the use of concepts to deny the former the benefits of a broad social act such as the Sherman Act casts doubt upon the validity of such concepts.

The value to society of differing sources of supply and of differing productive operations for the production of a certain product may well be greater than where the end product has numerous but substantially similar origins. And so where there are alternative end products. An act destructive of one type of origin or product may leave the others unimpaired.

The end product is a form of wealth but so are the processes, the know-how and the industrial operations from which it came. And the economic consequences of the production of the product (*e.g.*, the growth of a city) may be as great, if not greater, than that arising from the sale of the product. If we could scale uses in their order of importance on a 100% scale, a use for which a particular type of product was better than alternative types might have a social or economic importance disproportionate to its percentage of the total sales of such products. The Sherman Act should—and this writer believes it does—protect the public from a monopoly of particular sources and of particular productive operations as well as of particular end products.

There could be few antitrust cases won by a plaintiff, whether private or government, if a defense of substitute products were freely permitted.^{72a} It has been estimated that it cost *du Pont* over \$1,000,000

72a. Cf. *Syracuse Broadcasting Corp. v. Newhouse*, CCH TRADE REG. REP. (1956 Trade Cas.) ¶68468 (2d Cir. Feb. 9, 1956); *Inge v. Twentieth Century-Fox Film Corp.*, CCH TRADE REG. REP. (1956 Trade Cas.) ¶68429 (S.D.N.Y. July 31, 1956); *United States v. Ohio Crankshaft Co.*, CCH TRADE REG. REP. (1956 Trade Cas.) ¶68405 (N.D. Ohio June 21, 1956). In *United States v. Northern Pac. Ry.*, CCH TRADE REG. REP. (1956 Trade Cas.) ¶68401 (W.D. Wash. June 23, 1956), the court on reargument expressly rejected the *du Pont* case approach as inapplicable to a tie-in charge under §1 of the Sherman Act. (The paragraph on this point, added to the court's opinion after the reargument, does not appear in the Trade Regulation Service Report.)

One of the issues in the pending appeal in *United States v. Kansas City Star Co.*, 1955 Trade Cas. ¶68040 (W.D. Mo.), in which monopoly of news and advertising was charged, is whether the trial court was correct in excluding defense evidence as to billboards and national magazines. But the same court had permitted defense evidence as to weekly newspapers or neighborhood shopping papers, catalogs, hand-

to present this defense. The Antitrust Division has neither the money nor the manpower to develop such issues. And such issues are hardly likely to reduce the size of the "big case." The courts might well prefer to wrestle with monopoly "with respect to some landmark more measurable than 'cross elasticity of demand.'" ⁷³

Our antitrust laws and policies have been regarded by other countries as uniquely broad and strong. Certainly, there is nothing in the Sherman Act which would require an answer to the question we have discussed which would cause us to lose that regard. Yet, the doctrine of substitute products would permit a substantial weakness in our antitrust laws which at least one foreign country—Canada—appears to have rejected,⁷⁴ and another—England—has refused to

bills and direct mail advertising, local magazines, pamphlets, bulletins and the like published by social, fraternal, religious and other organizations, street car cards, movie newsreels, topical books and sky writing, among other things. As to this evidence the court instructed the jury that if it "will determine for themselves the factual situation as to what is and what is not in competition in the disseminating of news and advertising within the metropolitan area." *Id.* at 70373.

73. Economists commonly discuss this problem in terms of "cross elasticity of demand." See STIGLER, *THE THEORY OF PRICE* 48-49 (1952). The practicing lawyer might well shudder at attempting to explain to the average judge economic theories of this subject. See the discussion in 45 *AM. ECON. REV.* 373 (1955). While this case was pending in the Supreme Court, two prominent articles, dealing in whole or in part with the problem of the *Cellophane* case, were published. Both approached the issue in terms of "workable competition" and were opposed to the result in the *du Pont* case. One was written by Stocking and Mueller (*The Cellophane Case and the New Competition*, 45 *AM. ECON. REV.* 29 (1955)), and the other by Stocking (*The Rule of Reason, Workable Competition and Monopoly*, 64 *YALE L.J.* 1107 (1955)). Both are economists, the latter particularly noted for his support of broad application of the antitrust laws. But shortly before the opinion of the Supreme Court in the substitute products case was handed down, the "slipperiness of the workable competition" concept was forcibly demonstrated by two other economists. Dirlam & Stelzer, *The Cellophane Labyrinth*, 1 *ANTITRUST BULL.* 633 (1956). To this writer, support for this criticism is found in the frequent use of those articles by both the majority and minority opinions in the *Cellophane* case. It is regrettable, however, that Dirlam and Stelzer's article offers no substitute approach or theory. In a recent Canadian case in which the effect of price fixing was an issue, the court made the following pertinent comment: "Mr. Robinette argued that one considered the matter of competition as a circle and the inquiry must be directed to determine what segment of the circle was occupied by price competition. I think there is much force in Mr. Arnup's argument that such an approach involves a degree of economic speculation and psychological inquiry that is not contemplated by the statute. To put on the Crown the proof of what influences buyers to buy is a burden that has not yet been imposed by jurisprudence." *Regina v. Northern Elec. Co.*, [1955] *Ont.* 431, 443, 3 *D.L.R.* 449, 461-62.

74. The Canadian Combines Act, 1935, 25 *Geo.* 5, c. 54 (Canada), states that monopoly "means one or more persons . . . (b) who either substantially or completely controls throughout any particular area or district in Canada or throughout Canada, the class or species of business in which he is or they are engaged." In *Eddy Match Co. v. The Queen*, 109 *Can. Crim. Cas. Ann.* 1, 14 (1953), the Court said:

"It is contended by appellants that the manufacture of wooden matches is not a class or species of business. They say that the wooden match is a device for producing light or fire and as such it is in competition with every other device designed to achieve the same end; *viz.* the paper match and the mechanical lighter. . . .

"It is true that the manufacture of lighting devices, whatever be the type or kind, can be regarded as a general class of business which would include wooden matches. But it seems strange to suggest that within the general class there cannot be as many types of businesses as there are species of devices. . . . [S]ince this commodity can be distinguished from the other devices . . . it must be said that the manufacture of wooden matches is a class or species of business. . . ."

narrow its approach to monopoly problems by broadening a "market" concept.⁷⁵

It is submitted that neither the language nor the policy of the Sherman Act calls for a contrasting position in this country.

Since the Supreme Court's decision in the *Cellophane* case was rendered by less than a majority of the Court, it is to be hoped that the government will not hesitate to press this issue again in another case before the full Court. The gap in antitrust enforcement made by that decision is one which should be filled either by judicial or legislative action.^{75a}

OLIGOPOLY

One may doubt that the term "oligopoly" was known to the authors of the Sherman Act, nor to several early generations of lawyers who subsequently dealt with antitrust matters.⁷⁶ It has become, however, a term of considerable importance.

The single monopolist has become exceedingly rare, at least on a national scale. In many industries, however, we find a small number of companies controlling or dominating an industry.⁷⁷ This situation has become known as "oligopoly." It is one where the power or position of each oligopolist is such that its individual action will have an appreciable effect on the market.⁷⁸ Normally, in an oligopolist industry, there is substantial uniformity of prices, especially (but not necessarily) where the products are standardized.⁷⁹ In such an industry, generally, the policies of a small number of companies with

75. The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66, § 3(3) provides: "Where goods of any description are the subject of different forms of supply, the references . . . to the supply . . . shall be construed as references to any of those forms of supply taken separately, to all those forms of supply taken together or to any of those forms of supply taken in groups . . ." in the discretion of the administering bodies. According to § 20(3), monopoly criteria include "value or cost or price or quantity or capacity or number of workers employed or some other criterion . . .," alternatively or in combination, as appears suitable to the administering body.

75a. Congress might re-enact § 2 of the Sherman Act and, by contemporaneous legislative history, make clear its repudiation of the *du Pont* case and its understanding that the language used in the act means what it says.

76. "Some ten years ago it was still possible that men professionally concerned with economic questions had never heard the word 'oligopoly.'" MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION* 347 (1952). Resort to *Words and Phrases* reveals a reference to a single case where the term was used. That case was the 1953 *du Pont* suit, earlier discussed in this article. A German writer is said to have used the term in 1914. See CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 8 n.2 (6th ed. 1948).

77. See MUND, *GOVERNMENT AND BUSINESS* 127-35 (2d ed. 1955); VATTER, *SMALL ENTERPRISE AND OLIGOPOLY* (1955).

78. See ANSHEN & WORMUTH, *PRIVATE ENTERPRISE AND PUBLIC POLICY* 88 (1954).

79. In *United States v. E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 49 (D. Del. 1953), the court said: "'Oligopoly' is regarded as consisting of those situations

respect to price—and often with respect to volume of production and distribution—are determined in the light of knowledge that individual company action will induce reciprocal action on the part of the other large competitors.⁸⁰ A common badge of oligopoly is “price leadership.” Even more common in this type of industry structure is the promptness with which a price change by any one of the oligopolists is matched by the other oligopolists. Basing-point and delivered price systems are common where oligopoly is present. Oligopoly has been thought to promote a philosophy of curtailment of production in order to ensure a return on all costs.⁸¹

Characteristics commonly present when a single company dominates an industry—such as control over supply and price and difficulty of entry—are also commonly found in an oligopolistic industry. Economists recognize that the rule of the few may have an effect identical with dominance by one.⁸² And it has been pointed out that either monopoly or oligopoly on one side of a market is likely to engender monopoly or oligopoly on the other side.⁸³ Oligopoly, therefore, may be considered a form of monopoly,⁸⁴ although some economists would not accept this premise.⁸⁵ The Federal Trade Commission, in considering mergers under section 7 of the Clayton Act, has thought it proper to take into account the effect of the merger upon making an industry oligopolistic.⁸⁶

where a few sellers sell only a standardized product.” Despite this statement, an examination of economic authorities reveals that many do not make such qualification. See WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 5 (TNEC Monograph No. 21, 1940).

80. See WILCOX, *op. cit. supra* note 79; Note, “Follow-The-Leaders” Clauses: The Use of Ancillary Covenants as a Vehicle for Cooperative Monopoly, 64 YALE L.J. 1049, 1056 (1955).

81. VATTER, *op. cit. supra* note 77, at 58. Vatter explores at some length the effect of oligopoly upon small enterprises in certain industries.

82. Cf. MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 503 n.22 (1952); PEGRUM, *THE REGULATION OF INDUSTRY* 88 (1949); VATTER, *op. cit. supra* note 77. See also dissent in *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 414 (1956).

83. See GALBRAITH, *AMERICAN CAPITALISM; THE CONCEPT OF COUNTERVAILING POWER* 119-21 (1952).

84. See MUND, *op. cit. supra* note 77, at 193; Bain, *Conditions of Entry and the Emergence of Monopoly*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 216 (Chamberlin ed. 1954); cf. STOCKING & WATKINS, *MONOPOLY AND FREE ENTERPRISE* 87-93 (1951); Vito, *Monopoly and Competition in Italy*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 44-50 (Chamberlin ed. 1954); Wallace, *Monopolistic Competition*, 26 AM. ECON. REV. 77 (Supp. 1936).

85. Professor Stigler, after discussing the effects of substitutes, states: “This leads us to define monopoly as a single seller of a commodity that does not have a highly elastic demand.” STIGLER, *THE THEORY OF PRICE* 206 (1952). See also MUND, *op. cit. supra* note 77, at 193. For a review of some of the economic thought on this score, see Stocking, *The Rule of Reason, Workable Competition and Monopoly*, 64 YALE L.J. 1107, 1108-11 (1955).

86. *Pillsbury Mills, Inc.*, F.T.C. Dkt. 6000 (Dec. 21, 1953).

Although some economists recognize a relationship between the doctrine of substitute products and oligopoly,⁸⁷ many economists appear to accept and discuss market control by an oligopoly without acknowledging that a doctrine of substitute products would make an oligopoly situation rare.⁸⁸ There would be few oligopolies if the breadth of a market were to be measured by the flexible rules of substitute products.

Uniformity of Action Under the Sherman Act

Many a lawyer and many an economist (doubling as a lawyer) would deny that an oligopoly is a condition reached by the Sherman Act. This is especially true where the products made and sold by the members of the oligopoly are wholly or substantially standardized. It has been asserted that for an oligopoly to come within the Sherman Act there must be collusion, and the distinction has been taken between concert of action arising from agreement and concert of action arising from the structure of an industry.⁸⁹ On the other hand, the typical oligopoly situation has been thought by some to come within the Sherman Act.⁹⁰

87. See VATTER, *op. cit. supra* note 77, at 114-15.

88. See WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 10 (TNEC Monograph No. 21, 1940); Chamberlin, *Product Homogeneity and Public Policy*, 40 AM. ECON. REV. 85, 87 (1950); Wilcox, *On the Alleged Ubiquity of Oligopoly*, 40 AM. ECON. REV. 67, 68-69 (1950). See, however, STIGLER, THE THEORY OF PRICE 222 (1952): "When a few firms sell one product or products that are close substitutes, each must take account of the effects of his policy on his rivals. This is the distinctive problem of industries with few firms (oligopoly)." Galbraith points out that price fixing under oligopoly may be more difficult than where there is a single monopolist because there is never complete substitutability between different sellers. GALBRAITH, AMERICAN CAPITALISM; THE CONCEPT OF COUNTERVAILING POWER 46 (1952).

89. See STOCKING & WATKINS, *op. cit. supra* note 84, at 88-89; 64 YALE L.J. 1049, 1057 (1955); *cf.* Morton Salt Co. v. United States, CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68412 (10th Cir. July 5, 1956); ANSHEN & WORMUTH, *op. cit. supra* note 78, at 132, 268; CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 31 (6th ed. 1948). It has been recognized that the results of express agreement among oligopolists and tacit agreement among them are very similar. SCITOVSKY, WELFARE AND COMPETITION 384 (1951). Heflebower, *Monopoly and Competition in the United States*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 135 (Chamberlin ed. 1954), with respect to the legal position of oligopoly states, "The trend of the argument here, on both the economics and the law of monopoly and competition, points toward a possible impasse with respect to oligopoly. . . . While such market structures are not themselves illegal, increasingly their manifestations are. . . ." It has been noted that the courts have readily found "free and open competition" under fair trade laws in oligopoly situations. See Herman, *A Note on Fair Trade*, 65 YALE L.J. 23, 25-26 (1955).

90. MUND, *op. cit. supra* note 77, at 233: "The belief of many economists and legal experts is that the Sherman Act (as well as the Federal Trade Commission Act) *can and should* be applied to unified selling by a few dominant concerns who allegedly are acting 'innocently and independently'. The situation of oligopoly can be attacked (a) on the principle of conscious parallel action (implied conspiracy) or (b) under section 2 of the Sherman Act as a condition of monopoly." With respect to (b), Mund subsequently gives the rationale that "the larger companies jointly or collectively possess the power to control prices." *Id.* at 240. See also MACHLUP, THE ECONOMICS OF SELLERS' COMPETITION 350 (1952); Levitt, *Law, Economics and Antitrust Revision*, 22 So. ECON. J. 405 (1955).

Apparently many economists appear to believe that oligopoly without collusion should not be condemned under the antitrust laws although a number find it difficult to avoid a conclusion of collusion where monopoly results are found.⁹¹ As far as the writer knows, the issue has never been presented whether a group of defendants—without a finding of collusion—can be held to have monopolized trade and commerce under section 2 of the Sherman Act.⁹² Some courts have recognized that a monopolist may have less freedom to engage in non-competitive endeavors than a non-monopolist.⁹³ And a similar rule might well be held to apply to an oligopoly.⁹⁴

It is, of course, clear that a monopoly charge under section 2 is not limited to a monopolist but extends to a number of legal persons dealt with in the aggregate. The cases where a monopolization charge was upheld against a number of defendants are many.⁹⁵ Writers not infrequently say that in an oligopoly situation conspiracy, monopolistic conduct or agreement is likely to occur, and that the proof to show monopolistic conspiracy need not be strong.⁹⁶ At least one case supports such view.⁹⁷ The argument that price uniformity in an oligopoly may be as compatible with a competitive situation as with a collusive one is much less likely to be true in a period of changing conditions than under stationary conditions. The wider the geographical range of

91. See review of opinions in DIRLAM & KAHN, *FAIR COMPETITION* 33-34 (1954). But see STOCKING & WATKINS, *op. cit. supra* note 84, at 112; Wallace, *supra* note 84.

92. In *United States v. National Lead Co.*, 332 U.S. 319, 352 (1947), the Court rejected on various grounds the Government's request for divestiture of certain plants. In discussing this request, the Court said that there was no showing that four major competing units would be preferable to two, or six preferable to four. While this can scarcely be considered a precedent one way or another it is not uncommon to find antitrust judgments proceed on a theory that to dissipate monopoly something more than the creation of one or two competitors is necessary. See also STOCKING & WATKINS, *op. cit. supra* note 84, at 551.

93. *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F. Supp. 362 (E.D. Pa. 1947); *James v. Marins-ship Corp.*, 25 Cal. 2d 721, 731-37, 155 P.2d 329, 335-38 (1944); *Wilson v. Newspaper and Mail Deliverers' Union*, 123 N.J. Eq. 347, 350-51, 197 Atl. 720, 722 (1938).

94. *Cf.* 64 YALE L.J. 1049 (1955).

95. *E.g.*, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). In the *American Tobacco* case, the defendants' brief in the Supreme Court argued that the phrase "every person who shall monopolize" in § 2 of the Sherman Act reached only the conduct of a single person or corporation. The Government's brief listed a number of cases which characterized the acts of more than one as monopolizing. The Supreme Court in its opinion does not refer to this issue, possibly because, as argued by the Government, it was not within the scope of the grant of certiorari. Brief of the Appellee, p. 41, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

96. *Cf.* DIRLAM & KAHN, *FAIR COMPETITION* 33-34, 65-76 (1954); Stocking, *The Rule of Reason, Workable Competition and Monopoly*, 64 YALE L.J. 1107, 1111 (1955).

97. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *cf.* *Morton Salt Co. v. United States, CCH TRADE REG. REP.* (1956 Trade Cas.) ¶ 68412 (10th Cir. July 5, 1956). See also *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.33 (1953).

price uniformity, the more likely it is that the basis of uniformity has been collusion rather than competition.⁹⁸ The members of an oligopoly often act like a combination and it has been said that "... the Antitrust Act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce" ⁹⁹

It would seem that, at the very least, the oligopolists would have a heavy burden in defending uniformity of action by a plea of independency of action.¹⁰⁰ The Supreme Court has held that "conscious parallelism" is not conclusive proof of concert of action within the Sherman Act.¹⁰¹ The Attorney General Committee's *Report* has left this reader in the dark as to the effect it would give to "conscious parallelism"—whether it could take the plaintiff to a jury—and others have experienced the same difficulty.¹⁰² It seems well settled, however, that uniformity of action as to prices may give rise to an inference and may be evidence of a concert of action under the Sherman Act.¹⁰³ Artificial price levels may be regarded as especially suspect.¹⁰⁴

The Attorney General's Committee has stated that, "The courts class as 'monopolies' under section 2 those situations where a single seller, or group of sellers acting in concert, have control over the market price."¹⁰⁵ The *Report* does not discuss whether the "concert" may be one arrived at by the independent determination of each member

98. See STIGLER, *THE THEORY OF PRICE* 239-40 (1952). The Government's brief in *United States v. E. I. du Pont de Nemours & Co.*, No. 3, U.S., Oct. 1956 term argues strongly for a definition between "combination" and conspiracy. The case is concerned with du Pont's stock interest in General Motors.

99. *Northern Securities Co. v. United States*, 193 U.S. 197, 337 (1904).

100. As to the absence of inevitability of uniform prices in an oligopoly situation even where there are standardized products, see THE BRITISH MONOPOLIES AND RESTRICTIVE PRACTICES COMMISSION, *REPORT ON THE SUPPLY OF CERTAIN RUBBER FOOTWEAR* 63-65, 72-75 (1956); THE BRITISH MONOPOLIES AND RESTRICTIVE PRACTICES COMMISSION, *REPORT ON THE SUPPLY AND EXPORT OF CERTAIN SEMI-MANUFACTURERS OF COPPER AND COPPER-BASED ALLOYS* 29, 47, 49 (1955).

101. *Theatre Enterprises v. Paramount*, 346 U.S. 537, 541 (1954).

102. See Handler, *Annual Review of Antitrust Developments*, 10 N.Y. CITY BAR ASS'N RECORD 332, 344 (1955).

103. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939); *National Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955); *Milgrim v. Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *Fort Howard Paper Co. v. FTC*, 156 F.2d 899 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946); *Hathaway Motors, Inc. v. General Motors Corp.*, 18 F.R.D. 283 (D. Conn. 1955); see Markham, *The Per Se Doctrine, and the New Rule of Reason*, 22 So. Econ. J. 22, 29 n.16 (1955). But see *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950); *Arkansas Fruit Co. v. Texas*, 1955 Trade Cas. ¶ 68070 (Tex.); Handler, *supra* note 102, at 342-46.

104. It has been asserted that "... uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce may be inferred." *Cement Mfrs. Ass'n v. United States*, 268 U.S. 588, 606 (1925).

105. *REPORT* at 43.

of an oligopoly to act in concert or merely one where the parties have agreed to so act. To the writer, the difference is negligible once the performance of the dominant members of an industry is explainable only either on the basis of express agreement or knowledge by each that similarity of action by the others is expected and will take place.¹⁰⁶ If *X* oligopolist raises prices expecting *A*, *B* and *C*—fellow oligopolists—to do likewise, and they do, and the *X* price becomes the market price, *X* may well be considered to have a monopoly power; and if *A* raises the price and the others likewise follow, *A* may be considered to have such power, and so of *B* and *C*. In such situation, each has monopoly power whether by agreement or by the structure of the industry. And it is concert of action no matter how it is sliced.

The courts have recognized the presence of collective monopoly.¹⁰⁷ It is true that in such cases conspiracy was also found. But it is difficult to see how some economists find little difficulty in treating collective monopoly as collusive oligopoly¹⁰⁸ but reject a concept of monopoly where collusion is absent. It would appear that "monopoly" could have economic content even if there were no Sherman Act. It is significant that the courts have found monopolization by several companies even though these companies were not affiliated.¹⁰⁹ Section 2 of the Sherman Act, unlike section 1, does not speak of an agreement of monopoly. And if several companies may be held to have monopolized under section 2 because they have acted as a monopoly, should it matter that they acted as such by agreement or because of the structure of the industry? It may be noted that, in recent years, the courts in testing a practice by the antitrust laws appear increasingly to have looked toward the collective effect of the practice engaged in by a number of concerns, even though collusive concert of action was absent.¹¹⁰

In the *Aluminum* case,¹¹¹ the court was dealing with a one-company monopoly. There, the court said, in language expressly approved by the Supreme Court,¹¹² with respect to the connection between contracts fixing prices and the mere existence of monopoly:

106. Cf. *STOCKING & WATKINS*, *op. cit. supra* note 84, at 89.

107. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881, 894 (S.D.N.Y. 1949), *aff'd*, 340 U.S. 803 (1950).

108. See MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 502 (1952).

109. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

110. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293, 309 (1949). See also *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.33 (1953).

111. *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945).

112. *American Tobacco Co. v. United States*, 328 U.S. 781, 813 (1946).

"That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce."¹¹³

It would seem that this rule would apply equally where monopoly power rested in more than one and less than many, and they fixed a price.

It seems consistent with a concept of monopoly to envisage a monopoly held by several persons even though not acting in combination with one another. Section 2 of the Sherman Act speaks of monopolization, not merely combination to monopolize or monopolistic combination. If I gave two persons the sole right to practice medicine in a city, they have a monopoly of such practice in that city even though they practice separately. And if they had secured that position by buying up the practices of ten other doctors, there too, it is submitted, monopolization would be present.

Prior to the Statute of Monopolies,¹¹⁴ monopoly grants were made by the Crown to more than one person by the same grant and at least some of such persons do not appear to have been acting jointly.¹¹⁵ The Statute of Monopolies,¹¹⁶ the English Monopolies and Restrictive Practices (Inquiry and Control) Act¹¹⁷ and the Canadian Combines Act¹¹⁸ define monopoly in terms of plural persons as well as a single person. In this country, at an early date, the conception of a monopoly in the hands of a few as well as in the hands of one appears to have been acceptable legal thinking.¹¹⁹

It would seem, therefore, that oligopoly could be reached under section 2 of the Sherman Act either under a theory of concert of action or on the theory that this section does not require the structure of a monopoly to be conspiratorial.

113. *United States v. Aluminum Co.*, 148 F.2d 416, 428 (2d Cir. 1945).

114. 21 JAC. 1, c. 3 (1623).

115. See Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 12 L.Q. REV. 141 (1896). For a comment on a bible printing monopoly held by four British publishers through historical bases, see 179 THE ECONOMIST 877 (1956).

116. The act prohibits monopoly grants "to any person or persons."

117. Section 3(2) applies to two or more persons supplying at least one-third of particular goods who "whether by agreement or arrangement or not, so conduct their respective affairs as in any way to . . . restrict competition. . . ."

118. See note 75 *supra*.

119. See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 607 (1837).

The Impact of Applying Section 2

It may be urged, however, that since oligopoly is frequently found in American industry, a thesis that oligopoly is a monopoly condition subject to the Sherman Act would require a reorganization of a considerable part of American industry or at least bring much of it under suspicion. There are a number of answers which may be given to this proposition not altogether consistent with one another. If oligopoly is a condition with which the policy and the language of the Sherman Act is concerned, it is difficult to justify its existence by an argument of its prevalence. Within the last fifteen years, few large-scale industries have not been subjected to monopoly charges without benefit of any monopoly-oligopoly theory. Again, if as a number of courts have suggested, there are kinds of monopoly which do not come within the Sherman Act,¹²⁰ we may suppose that oligopolies similarly situated would receive absolution. Many a monopoly stands untouched because manpower or other considerations cause a selective process in filing antitrust suits on the part of the Government. It has been argued that original oligopolies might be viewed more harshly than oligopolies brought about through the growth of "countervailing power."¹²¹ And while it might be urged that both should be attacked concurrently, where this cannot readily be done the likelihood of antitrust action as to the latter is diminished. Certainly, in monopoly situations, it is realistic to assume that some examples of concentrated power have not been touched because they have evolved to meet an already existing concentration to which the antitrust laws have not been applied.

Oligopolies are not necessarily alike. The facts as to one regarding degree of concentration, degree of uniformity of action, means to attain that position and to maintain it, integration, degree of competition in respects other than price, and performance generally, will often differ as to another; and such differences are significant in determining whether a case will lie under the Sherman Act and whether it is one which should be brought.

CONCLUSION

Antitrust prosecutors are neither Don Quixotes nor Sir Galahads. But, just as a doctor cannot properly ignore a small but painful sore

120. Cf. Comer, *Monopoly and Competition*, 36 AM. ECON. REV. 154, 158 (1946).

121. See GALBRAITH, *AMERICAN CAPITALISM; THE CONCEPT OF COUNTERVAILING POWER* 144-47 (1952); Leovinger, *Antitrust and the New Economics*, 37 MINN. L. REV. 505, 537 (1953).

because it is not a cancer, the antitrust practitioner cannot ignore a small but painful economic wrong because it has not developed into a large economic wrong. And society has no way of knowing the comparative value to it of the legal persons injured by the smaller wrong and those injured by the larger wrong.

Substitute products would protect monopoly until it developed into super-monopoly, and oligopoly would protect even super-monopoly as long as held by more than one. Neither should have an immunity from antitrust prosecution.